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Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF ARKANSAS — PETITIONER

VS. — NO. 87-357

EDWARD CHARLES PICKENS — RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes Edward Charles Pickens, through counsel serving pro bono publico, and for his Motion for Leave to Proceed In Forma Pauperis states:

1. Respondent is incarcerated in the Arkansas Department of Correction Death Row in Tucker, Arkansas. He is indigent. He proceeded in forma pauperis in the United States District Court and in the Court of Appeals for the Eighth Circuit in the proceedings resulting in the state court resentencing from which this petition by Arkansas stems. Undersigned counsel served by appointment in the trial court and on appeal to the Arkansas Supreme Court; the opinion of the Court in Petitioner's appendix indeed refers to matters litigated regarding compensation of counsel. Counsel is filing this Response pro bono. Throughout the twelve years of the proceedings of this case, Respondent has been represented by counsel serving by appointment or pro bono.

2. For some reason unknown to counsel, Petitioner has not executed a recent in forma pauperis affidavit. The

situation may be related to recent correspondence which has given counsel concern about Respondent's mental state. Counsel will endeavor to get Respondent to execute a more recent affidavit. As counsel reads Rule 46.1, since Respondent proceeded in forma pauperis in the District Court and Court of Appeals, a new affidavit is not necessary.

WHEREFORE, it is prayed that this Response be permitted in forma pauperis.

EDWARD CHARLES PICKENS

JEFFREY M. ROSENZWEIG
300 Spring Building, Suite 500
Third & Spring Streets
Little Rock, Arkansas 72201
(501) 372-5247

Attorney for Respondent
pro bono publico

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, attorney for Respondent, hereby certify that a copy of the foregoing Motion was mailed by first class mail postage prepaid to Clint Miller, Assistant Attorney General, Heritage West Building, Markham and Scott Sts., Little Rock, Ark. 72201 this 28 day of September, 1987.

JEFF ROSENZWEIG

No. 87-357

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ARKANSAS — PETITIONER

VS.

EDWARD CHARLES PICKENS — RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE FIFTH, SIXTH, FOURTEENTH AND MOST PARTICULARLY THE EIGHTH AMENDMENTS, AS APPLIED THROUGH THE FOURTEENTH AMENDMENT, PERMIT A CAPITAL DEFENDANT TO PRESENT EVIDENCE OF MITIGATING POST-OFFENSE BEHAVIOR IN A CAPITAL SENTENCING PROCEEDING, OR WHETHER THIS COURT SHOULD OVERRULE SKIPPER V. SOUTH CAROLINA.

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The Supreme Court should deny the petition for certiorari because the Arkansas Supreme Court's decision was a proper application of the rule of Skipper v. South Carolina, 476 U.S.____, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986) and specifically contemplated by Skipper and its progeny and predecessors; that the decision stands on valid constitutional footing; that the Arkansas court never decided the independent state grounds also presented to it for review; and that full treatment hereof would be a waste of this Court's scarce time, since even if Arkansas' argument were sustained here, Pickens would have a new resentencing proceeding on independent state grounds for which Arkansas is not seeking certiorari here.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF ARKANSAS PETITIONER

VS. No. 87-357

EDWARD CHARLES PICKENS RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Arkansas, Pickens v. State, Ark. 362, 730 S.W.2d 230 (1987) is reprinted in Petitioner's appendix.

JURISDICTION

This Court has jurisdiction to review the issue presented by Arkansas. It should be noted that in this capital resentencing proceeding, Pickens' sentence was reversed on an independent state ground (error in jury selection) as well as the ground presented here by Arkansas. Arkansas seeks no review of the independent state ground, and this Court would have no jurisdiction of that anyway.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> "(N)or be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution states in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor..."

The Eighth Amendment to the United States Constitution states in pertinent part:

> "(N)or cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> "(N)or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Pickens agrees in essence with Arkansas' statement of the case.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE DECISION OF THE ARKANSAS SUPREME COURT IS SPECIFICALLY GROUNDED AND CONTEMPLATED IN SKIPPER V. SOUTH CAROLINA AND ITS PROGENY; THAT IT IS SPECIFICALLY GROUNDED IN THE UNITED STATES CONSTITUTION, THAT THE DECISION DOES NOT CREATE A RANDOM RESULT; AND THAT IT WOULD BE A WASTE OF THIS COURT'S RESOURCES TO GRANT CERTIORARI ON A CASE THAT WILL BE RETRIED WHATEVER THIS COURT DOES.

Edward Charles Pickens was convicted of Capital Murder and sentenced to death by the Circuit Court of Prairie County, Arkansas in 1976. In 1984, the United States Court of Appeals for the Eighth Circuit vacated the death sentence and remanded the case for a resentencing proceeding. Pickens v. Lockhart, 714 F.2d 1455 (1983). The basis for the vacation was the failure of Pickens' original trial counsel to present evidence of the difficult and violent circumstances in which Pickens was reared. A first attempt at resentencing in 1984 was aborted by a mistrial during jury selection. In 1985 a resentencing was held and he was again sentenced to death.

During the 1985 resentencing trial, the trial court refused to permit Pickens to introduce testimony of various family members and friends --- including a Catholic lay deacon with whom he had worked in prison and a schoolteacher with whose classes he had corresponded --- regarding his rehabilitation, progress and good works

since the date of the offense in 1975. Additionally, the trial court excised from the videotaped testimony of a prison psychologist all references to matters occurring after the date of the offense, October 20, 1975.

Pickens objected, of course, to the refusal of the trial court to allow presentation of the testimony. Pickens based his position on several grounds: that the Constitution, as then most recently construed in the Eighth Amendment cases of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) required introduction of the evidence, that he had a right to present a defense, that the Arkansas statute (Ark. Stat. Ann. 41-1301 et seq.) mandated that he be allowed to introduce it, and that the prosecuting attorney had made it relevant by asking voir dire questions about holding someone responsible after a lapse of years.

While the case was on appeal, the Supreme Court decided Skipper v. South Carolina, 476 U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Pickens presented the Skipper decision, which relied on Lockett and Eddings as did he at the trial court, and the Arkansas Supreme Court unanimously reversed on Skipper grounds.

That decision was correct and should not be reviewed by this Court. In addition to the original Skipper decision. This Court has reaffirmed the Skipper holding and its underlying rationale in several cases since. Truesdale v. Aiken, 480 U.S. _____, 107 S.Ct. 1394, 94 L.Ed.2d 539

(1987). In two other cases, the Court, through the device of the summary reversal, sent back to the trial court two cases where the proffered mitigating circumstances occurred after the first trial. Koon v. Aiken, 480 U.S. _____, 107 S.Ct. 1599, 94 L.Ed.2d 786 (1987). Patterson v. Aiken, 480 U.S. ____, 107 S.Ct. 1598, 94 L.Ed.2d 785 (1987). In Hitchcock v. Dugger, ____ U.S. _____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) the Supreme Court again reiterated the right to present all mitigating evidence.

It is clear that Skipper is not some sort of bizarre and aberrational holding, but rather one with vitality and reason commending it to the Court. It did not pop in out of thin air, but is firmly based on Fifth, Sixth and most particularly Eighth Amendment jurisprudence.

The right to present a defense is a paramount, fundamental one under due process-compulsory process-confrontation analysis superseding procedural bars. Chambers v. Mississippi, 410 U.S. 284 (1983). Washington v. Texas, 338 U.S. 14 (1973). A sentencing proceeding is one where all due process rights attach. Gardner v. Florida, 430 U.S. 349 (1977). Lockett and Eddings are affirmations of these tenets. Skipper and its progeny merely are applications of these rules to a particular type of evidence.

There is nothing in Skipper to prevent a prosecuting attorney from arguing, in support of the imposition of a death penalty, that the circumstances of the offense

outweigh any particular efforts a defendant may have made to change his ways. But death is different. Furman v. Georgia, 408 U.S. 238 (1972). A capital sentencing determination requires a higher degree of scrutiny for correctness in the particular case, not a lesser one. California v. Ramos, 463 U.S. 992 (1983). A capital defendant should not have any less right of allocution to the sentencer than a burglar or thief.

Arkansas argues that it is somehow unfair to single out, or to permit to be singled out, certain persons to derive benefit from reversed cases. That is a strong argument for abolition of the death penalty, but assuming for purposes of argument that the Supreme Court is not going to do that, there is no qualitative difference in that and the countenancing of different types of capital statutes in which an offense may be capital in one state and non-capital in another or a circumstance aggravating in one state and not in another. Gregg v. Georgia, 428 U.S. 153 (1976). Proffitt v. Florida, 428 U.S. 242 (1976). Jurek v. Texas, 428 U.S. 262 (1976). Or its rejection of mandatory dispositions for certain offenses. Woodson v. North Carolina, 428 U.S. 280 (1976). Roberts v. Louisiana, 428 U.S. 325 (1976). Sumner v. Shuman, ____U.S. ____, 107 S.Ct. 2716,____L.Ed.2d _____(1987). Or its rejection of mandatory comparative review. Pulley v. Harris, 465 U.S. 37 (1984). Or its rejection of allegation of systemic racial bias under the holding that

it is the individualized consideration that is to be examined. McCleskey v. Kemp, _____U.S. _____, 107 S.Ct. 1676, 95 L.Ed.2d. 262 (1987).

The Arkansas Supreme Court's decision in this case does not deviate from the line of cases and thinking upon which it is based. But even if the Court were to decide to re-examine the Lockett-Eddings-Skipper-Hitchcock line of cases, this is one the case to do so. Because of error in the jury selection process, Pickens is going to have a new resentencing trial in any event. It would be a waste of this Court's precious resources of time to accept this case for full argument.

CONCLUSION

Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

EDWARD CHARLES PICKENS

By: _____

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Attorney for Respondent

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, attorney for Respondent, hereby certify that a copy of the foregoing Response was mailed by first class mail postage prepaid to Clint Miller, Assistant Attorney General, Heritage West Building, Markham and Scott Sts., Little Rock, Ark. 72201 this 28 day of September, 1987.

JEFF ROSENZWEIG